Yet the FCC offers a far less satisfying rationale for the broadcast rule than the one rejected in *Time Warner II*, and one which relies on at least as much speculation and conjecture. In the cable context, the statute and the legislative history at least outlined their basis for the belief that some cable cap might be warranted, i.e., it was thought that individual cable operators typically exercise market power in their respective franchise areas and, at some level of national audience reach, would be in a position to preclude independently owned cable programmers from reaching a sufficiently large audience to be viable. *Time Warner II* at 5. Nonetheless, the *Time Warner II* court found the agency had failed to provide an adequate basis for the particular ownership limit of 30% that it established.[15]

By contrast, the FCC concluded, at the inception of the broadcast cap, that the rule was based on pure conjecture. *See* p. 5 *supra*. More than fifteen years later, it is beyond dispute, in the highly competitive television broadcast industry, that individual station owners do not exercise market power and have no capacity to exclude independent program services from the market. Indeed, the Commission's *Biennial Review Report* contained no empirical basis for concluding that the 35% ownership cap was necessary to preserve either diversity or economic competition in any market implicated by the national ownership rule.[16] Moreover, given the

---

[15] Thus, the court found the agency had set forth no evidence for its hypothesis that MSOs might act collusively to deny independent programmers a sustainable audience for their program offerings, and held that the Commission lacked statutory authority to regulate unilateral MSO programming decisions which, taken together, might have that result. *Id.* at 9.

[16] *See Biennial Review Report* at 11075; discussion at pages 27 *infra*. For purposes of analyzing whether a national ownership rule is necessary, the Commission has indicated that television broadcasters compete in several economic markets: the market for delivered video programming (i.e., competition for viewers), the local and national advertising markets, and the program production market. *Review of the Commission's Regulations governing Television Broadcasting*, 10 FCC Rcd. 3524, 3535 (1995). Given the Commission's recognition that the

(Continued...)

Time Warner II court invalidated the regulations at issue for being inconsistent with a congressional finding in favor of regulation, it is even more difficult to justify the cap in broadcast, where the congressional mandate is clear to *deregulate*.

Instead, the FCC struggled to come up with different justifications to support its retention of the national ownership cap, none of which remotely meets the *Time Warner II* standard. Specifically, it asserts that the Commission should: (1) "observe and assess" developments resulting from the recent relaxation of the duopoly local ownership rule before adjusting the national ownership cap, *Id.* at 11074; (2) "further observe" the effect of the 35% cap since it has resulted in many group owners acquiring large numbers of stations nationwide; and (3) retain the 35% national ownership cap as necessary for "maintaining the balance between networks and their affiliates." *Biennial Review Report* at 11074-75. None of these three, even when combined, is sufficient to sustain the broadcast cap, under any standard of review.

1. The "Observe and Assess" Justifications

The Commission's "observe and assess" and "further assess" approaches violate the requirements of the Telecommunications Act of 1996, as well as *Time Warner II.* As noted, under Section 202(h) of the Act, Congress has mandated that the Commission "*shall* determine

---

(...Continued)
national ownership rule is irrelevant to competition and diversity in markets which are local in geographic scope, the national ownership rule might conceivably further competition in only the national advertising and the program production markets. Yet the *Biennial Review Report* fails to discuss in any substantive manner the effect of the rule on competition in those markets, or to consider the "substantial evidence" presented by various parties that its repeal would have no such effect. *Biennial Review Report* at 11072. The FCC's failure to advance any empirical support for the rule in terms of the framework for analysis *which the agency*
(Continued...)

whether any of such rules are necessary in the public interest as the result of competition." (*emphasis added*). In refusing to fulfill this mandate, and instead delaying the determination by simply choosing to "observe and assess" the state of competition, the Commission is acting contrary to its obligations under the Act. The courts have repeatedly held that the FCC cannot simply "sidestep a reexamination" of its rules, especially when such a review is the result of a directive from Congress. *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979) (the Commission not only has the authority to reexamine longstanding rules as circumstances change, but is virtually required to do so in order to ensure that it continues to regulate in the public interest); *see also Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993)(where the Commission has a duty to re-examine whether a rule is still in the public interest the Commission cannot change the scope of the review to put the burden on parties seeking change); *Meredith Corporation v. FCC*, 809 F.2d 863, 873-74 (D.C. Cir. 1987) (where the "Commission largely undermines the legitimacy of its own rule" in a prior proceeding, the Commission is "obliged" to strongly consider those arguments in the context of a later challenge).

Most fundamentally, the Commission does not offer any coherent public interest theory to justify its proposal to delay regulatory reform while it "observes" marketplace developments. Specifically, it offers no explanation of how such changes might reasonably be expected to affect adversely identifiable public interest objectives.[17] To be sure, the *Biennial*

(...Continued)
itself has posited is likely in itself to be fatal to the rule's survival. *Time Warner II* at 6.

[17] In particular, the agency offers no plausible explanation for a need to monitor developments that flow from liberalization of the *local* ownership (or "duopoly") rule before
(Continued...)

Review Report recites in a footnote a skeletal list of speculative outcomes that the FCC claims are "more convincing" than countervailing public interest considerations advanced by proponents of liberalization.[18] But the agency makes no attempt to explain why any of these should be regarded as realistic possibilities - much less as sufficiently grave threats to warrant retention of the onerous rule that is now in place.[19] Accordingly, the Commission's stated public interest rationale is set forth *entirely* in speculative and conclusory terms. This approach contravenes the Commission's duties to analyze the contrary public interest justification for this rule in light of real-world marketplace considerations. Just as speculation was rejected as a basis for sustaining the 30% cable cap in *Time Warner II*, so should such conjecture lead the D.C. Circuit to overturn the agency's decision here.

It should also be noted that, as a general matter, the promotion of competition and diversity - the two traditional pillars of the FCC's broadcast regulatory program - do not support retention of the national broadcast ownership rule. This is true because national

---

(...Continued)
considering changes in the 35% *national* cap. *See* further discussion of the matter at p. 27, *infra*.

[18] *Id.* at 11073. This footnote, in its entirety, states that "These arguments are that eliminating or expanding the reach cap would increase the bargaining power of networks over their affiliates, reduce the number of viewpoints expressed nationally, increase concentration in the national advertising market, and enlarge the potential for monopsony power in the program production market." *Id.* at 11073, n. 78.

[19] In some glaring respects, these speculative harms have decisively been rejected in past FCC decisions. *See Evaluation of the Syndicated and Financial Interest Rules*, Memorandum Opinion and Order, 8 FCC Rcd 8270, 8286-89 (1993) (rejecting the proposition that the broadcast networks could exercise monopsony power); *see also Prime Time Access Rule*, 11 FCC Rcd 546, 560 (1995) ("There is no evidence that since we issued our fin/syn decision market conditions have changed such that the networks exercise monopsony or oligopsony power in the video programming production market").

ownership patterns do not have any meaningful impact on competition or diversity at the local level, where television viewing actually takes place. In the words of economist Michael Katz, it is a "fundamental fact" in the television industry that "competition for viewers takes place at the local level." *Katz Study* at 60 (*Attachment B*). Consequently, "[o]nly those stations in a viewer's local market can compete for his or her patronage. Thus, increased national ownership does not reduce competition for viewers." *Id.* at 60-61. Similarly, "increased national ownership does not reduce competition for either national or local advertising." *Id.* at 61. This is because, "[a]lthough [some] ads are sold on a national basis, *local* concentration is what is relevant for an analysis of advertising competition because viewer exposures to advertisements occurs at a local level." Id. The fact that competition and diversity are not generally helpful as rationales for the national ownership rule has forced the FCC to develop new regulatory theories (such as those discussed below) to support retention of the rule while it "observes" the marketplace.

b. The "Bargaining Power/Affiliate Preemption" Rationale

After more than six decades, the Commission advances a new so-called "bargaining power" argument. This novel rationale is the only public interest justification for the rule that is supported by *any* level of explanation or analysis in the *Biennial Review Report* (although the entire discussion of this theory is contained in a single paragraph). The agency's argument assumes that, if the rule were repealed, the networks might succeed in acquiring many additional stations that, at present, are independently owned. The FCC asserts that such a development might be undesirable because, whereas network owned and operated stations have a "strong economic interest in clearing all network programming," "independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed." *Biennial Review Report* 11075. The agency also suggests that, through such preemptions, independent ownership of stations "increases the diversity of programming by providing an outlet for non-network programming." *Id.* Thus, the FCC's "bargaining power" rationale is, in essence, reduced to a "network clearance" justification, neither of which can stand in the context of the national ownership cap.

In any event, the Commission makes no effort to reconcile its professed concerns about the ability of network affiliates to decline to clear network programs with its own past assertions and other well-known facts that clearly point to a contrary conclusion. First of all, the Commission has not explained why the maintenance of the modest existing level of preemptions is necessary to promote "diversity." For if an attractive program failed to secure time on a Viacom or CBS owned and operated station, there would be many other stations in the market (as well as cable network channels) to which the producer of the show could "pitch" the program. For example, if an existing affiliate was regularly preempting network programming to carry a particularly popular package of college basketball games and that practice ceased following acquisition of the station by a network, there ordinarily would be many other outlets in the market to which the games could be offered. This "freeing up" of an attractive program package would presumably be a welcome development in the eyes of other television stations in the market – especially the independents.[20]

Moreover, in repealing the prime time access rule (PTAR), the Commission has found that it was unnecessary for it to carve out time on affiliated stations to preserve a healthy market for independent programming. The PTAR prohibited network-affiliated television stations in the top 50 television markets from broadcasting more than three hours of network programs during the four prime time viewing hours. The rule was promulgated, in part, to "reduce the networks' control over their affiliates' programming decisions." *Review of the Prime Time Access Rule*, 11 FCC Rcd. 546, 547 (1995) (*Report and Order*). In 1995, the Commission phased out the rule because of the "substantially greater number of broadcast programming outlets" and the changes in market conditions which "safeguard[] affiliate autonomy." *Id.* at 547-48.

Having repealed a rule (PTAR) which directly addressed the supposed "problem," on the grounds that the problem was either nonexistent or no longer warranted a rule, the FCC cannot now claim, without explanation, that the same problem justifies a more sweeping and less tailored rule – here, the national television ownership cap. Such an approach contravenes the administrative law principle that an agency must carefully justify the basis for any departure from its precedent. *Checkosky v. SEC,* 23 F.3d 452, 491 (D.C. Cir. 1994) ("The short of the matter is that an agency acts arbitrarily and capriciously when, without sufficient

[20] The agency has also failed to explain how maintaining the modest level of preemptions could possibly outweigh the efficiency benefits of network ownership that the FCC has acknowledged, efficiencies that would help strengthen the public interest performance of the stations in all time periods.

explanation, it departs from its precedent."); *Pontchartrain Broadcasting Co. v. FCC*, 15 F.3d 183, 185 (D.C. Cir. 1994) ("an unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious"); *Schurz Communications Inc. v. FCC*, 982 F.2d 1043, 1054 (7th Cir. 1992) (an agency cannot "consistent with the principles of reasoned decision-making, [] pretend it had never found" the opposite of what it now contends).

By repealing PTAR, the FCC has also indicated that it does not believe that mandating access for independent programmers on affiliated stations is a sufficiently substantial governmental interest to warrant a regulation that "interferes with petitioners' speech rights by restricting the number of viewers to whom they can speak." *Time Warner II* at 3; *Greater New Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173, 190 (1999) (There is a "fundamental" flaw in the Commission's claim that it has a substantial interest to address if "the agency's practice is squarely at odds with the governmental interests asserted."). Plainly, adopting a more sweeping and less narrowly tailored rule in an area where the government has repealed a more narrowly tailored one also offends the First Amendment. *See, e.g.,* Greater *New Orleans*, 527 U.S. at 190. The FCC has not, in other words, even begun to explain how the very limited number of affiliate preemptions of network programming could possibly serve as a foundation for a rule as broad, sweeping, and preclusive as the existing 35% ownership cap.[21]

---

[21] The FCC also provides no data supporting the conclusion that a preponderance of affiliate preemptions are related to the presentation of public interest programming, rather than being economically motivated. An affiliate can almost always make more money by preempting an individual network program than by clearing it, since substituting other programming for network offerings allows the affiliate to sell all commercial availabilities in the time period for its own account, while receiving the benefit of "audience flows" from the

(Continued...)

In sum, if the D.C. Circuit were to subject the FCC's refusal to lift the 35% broadcast rule to scrutiny that even remotely resembled that which it applied to agency's efforts to maintain the 30% cable cap in *Time Warner II*, the court would overturn the broadcast cap. Clearly, a sufficiently serious legal question exists here to warrant interim relief.

C. No Interested Party Would Suffer Harm if the Interim Relief Were Granted.

An order maintaining the *status quo* pending appeal should be granted where there is "little indication that [such action] will result in substantial harm to either appellee Commission or to other [interested parties]."[22] Here, there is no indication that an extension of time pending appeal would result in any harm to either the FCC, television viewers, network affiliates, or competitors.

The various parties which opposed any change in the national ownership cap before the Commission raised arguments speculating on the effect of eliminating the cap on their ability to compete in various markets. *Biennial Review Report* at 11071-72. These concerns are insufficient to deny the requested relief in that "[t]he mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact." *Mova*

(...Continued)
network programming immediately preceding it. In a study of prime-time preemptions during the 1994-95 television season, CBS found that only 8.1% of such preemptions were attributable to local news and public affairs. Such preemptions were dwarfed by those for sporting events, which represented 41% of preemptions, and those for syndicated programming, which were 23% of the total. (Telethons and paid political broadcasts accounted for an additional 7.2 and 2.5%, respectively.) *See Comments of CBS Inc.* in MM Docket 95-92 (October 30, 1995), at 19.

[22] *Holiday Tours, Inc.*, 559 F.2d at 843 (staying an agency order that because, *inter alia*, there was "little indication that a stay pending appeal will result in substantial harm to either appellee Commission or to other tour bus operators").

Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1067 n.6 (D.C. Cir. 1998) (quoting *Holiday Tours, Inc.*, 559 F.2d at 843 n.3). In opposing such relief, parties cannot rely on mere speculation about harms that *might* occur unless the *status quo* were immediately repudiated. *See, e.g., Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (staying an agency order that would have allowed reduction of a bison herd on federal lands, where, *inter alia*, "[a]ll of the supposed consequences that the federal defendants urge would occur should the bison hunt *not* go forward are speculative.") (emphasis added). There is no evidence that any of the hypothetical harms identified by these parties have occurred in the last year, nor as shown in Section II, *supra,* can any such showing be made.

In staying an agency order that would have ousted a "bus and limousine" tour company from its "bus tour" line of business, the D.C. Circuit in *Holiday Tours, Inc.* held that "in the absence of substantiation of severe economic impact," continued competition with the petitioner in accordance with the *status quo* could not inflict a cognizable harm on other bus tour companies. 559 F.2d at 843 n.3. The present situation is identical. There has been no specific allegation — let alone "substantiation" — that extending the divestiture requirement of the *Divestment Order* pending judicial review of the *Biennial Review Report* would cause "severe economic impact" to any party. *Compare id.* Accordingly, continued Viacom ownership of its existing television stations in accordance with the *status quo* cannot and will not cause a cognizable harm to other parties.

D. Granting the Interim Relief Will Not Be Adverse to the Public Interest

As explained above, in the absence of interim relief pending review of the *Biennial Review Report*, Viacom would suffer substantial and irreparable harm by being forced to divest televisions stations before the judicial challenge to the rule was resolved. By contrast, were the interim relief to be granted, no off-setting harms would be suffered by the Commission, interested parties, or the public. Accordingly, the public interest would be served by extending the time Viacom has to come into compliance with the national ownership cap, which would merely maintain the *status quo* during the pendency of review proceedings.

III. CONCLUSION

The Commission should grant Viacom's request for interim relief to maintain the *status quo* by suspending the time for the company to come into compliance with the 35% cap until six months after issuance of the court's mandate in *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222, et. seq. (D.C. Cir.).

Respectfully submitted,

Michael D. Fricklas /fw

Michael D. Fricklas
Mark C. Morril
Viacom Inc.
1515 Broadway
New York, N.Y. 10036

Michael D. Fricklas
CBS Broadcasting Inc.
51 West 52nd Street
New York, N.Y. 10019

Anne Lucey
Viacom Inc.
1501 M Street, Northwest
Suite 1100
Washington, DC 20005

March 9, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2001, a copy of the foregoing Emergency Request of Viacom Inc. For Interim Relief Pending Judicial Review was delivered to the following.

By Hand Delivery:

Christopher J. Wright
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Daniel M. Armstrong
Associate General Counsel - Litigation
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Joel I. Klein
Assistant Attorney General
United States Department of Justice
Patrick Henry Building
601 D Street, N.W.
Washington, D.C. 20530-0001

Robert B. Nicholson
Robert J. Wiggers
United States Department of Justice
Antitrust Division
Patrick Henry Building
Appellate Section - Rm 10535
601 D Street, N.W.
Washington, D.C. 20530-0001

Edward W. Warren
Jay P. Lefkowitz
Richard A. Cordray
Ashley C. Parrish
KIRKLAND & ELLIS
655 Fifteenth St., N.W.
Suite 1200
Washington, D.C. 20005

Bruce D. Sokler
Christopher J. Harvie
Michael Pryor
Casey B. Anderson
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004

Jack N. Goodman
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Robert A. Long, Jr.
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

John G. Roberts, Jr.
H. Christopher Bartolomucci
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Cheryl A. Leanza
Media Access Project
950 18th Street, N.W.
Washington, DC 20006

By UPS:

Richard Cotton
National Broadcasting Company, Inc.
Law Department
30 Rockefeller Plaza
New York, NY 10112

Wade H. Hargrove
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD
209 Fayetteville Street Mall, P.O. Box 1151
Raleigh, N.C. 27602

Dated: March 9, 2001

Judy Wilson
Judy Wilson

A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review –	)	
Review of the Commission's Broadcast	)	MM Docket No. 98-35
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	

DECLARATION OF FREDRIC G. REYNOLDS

Pursuant to 28 U.S.C. § 1746, Fredric G. Reynolds under penalty of perjury states as follows:

1. I am currently Executive Vice President, Chief Financial Officer of Viacom Inc. and have held that position since May 2000.

2. I also served as Executive Vice President, Chief Financial Officer of CBS Corporation (formerly known as Westinghouse Electric Corporation) from March 1994 until May 2000.

3. I have personal knowledge of the facts stated in this declaration.

4. During the course of my duties as an officer in the broadcast industry, I have had extensive experience with the market for the acquisition of television stations in television markets of varying size.

5. Each individual television station is a unique and distinctive property. Stations differ markedly from one another in their technical characteristics (including their signal contours) – as well as in the size and demographics of their audience and in their public "image". They also differ in other intangibles that, taken together, comprise the goodwill of the enterprise.

6. In my experience, individual television stations in large and mid-sized markets are rarely available for purchase. If a station group owner were forced to divest such a station, there would be relatively little likelihood that that entity would be able to re-enter the market by repurchasing that station or by purchasing one that is comparable.

7. Accordingly, the forced divestiture of a television station in a large or mid-sized market would, in all probability, permanently deprive the group owner of a unique asset and exclude it from that market indefinitely.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 9, 2001.

Fredric G. Reynolds
Executive Vice President & CFO
Viacom Inc.

B

RECEIVED

NOV 1 8 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OLD RULES AND NEW RIVALS:
AN EXAMINATION OF BROADCAST TELEVISION REGULATION AND COMPETITION

Michael L. Katz

September 1999

This white paper was commissioned by ABC, CBS, and Fox.
Research assistance was provided by Charles River Associates, Inc.

EXECUTIVE SUMMARY

Over-the-air television is subject to numerous regulations that severely limit the ability of national networks and local stations to structure their operations in the ways that best serve their business objectives. Many of these rules were adopted half a century ago and are predicated on a lack of competition in broadcasting. Despite the dramatic increase in competition and the sweeping changes taking place both within the television industry and throughout the broader commercial environment in which this industry operates, regulatory reform has been slow and far too limited. Consequently, the current regulatory regime fails to reflect the new economic realities.

The national multiple ownership rule, which limits the ability of a single entity to own television stations on a nationwide basis, is a prime example of a regulation that is no longer justified in today's economic environment. Public interest analysis clearly demonstrates that the rule should be eliminated immediately. Inefficient rules like this one reduce the incentives to invest in non-subscription over-the-air television. They also reduce the ability of the broadcast television industry to compete against the growing number of outlets for video programming. These effects of regulation lower the economic welfare of both viewers and advertisers.

In 1996, Congress instructed the Federal Communications Commission to repeal or modify rules that no longer serve the public interest. Three years later, while the industry keeps changing, most of these rules have not. The perpetuation of outdated regulations is not only unnecessary; it can harm competition, diversity, and the public interest. The Commission should respond to Congress' mandate by seriously examining the current regulatory regime and by taking immediate action to revise or eliminate rules as appropriate.

******

Many of the regulations that still govern the broadcast television industry were adopted based on marketplace analyses conducted in the 1940s and 1950s, when television was in its infancy. During much of this period, there were only two television networks and most communities had few local stations. There were no cable systems.

There was no such thing as satellite transmission, let alone direct-to-home satellite video. Video cassette recorders and video games did not yet exist. And not even academics were thinking of the Internet. In this environment, rules restricting the ownership of broadcast networks, stations, and certain non-broadcast media properties, and rules constraining the contractual relationships between television networks and their affiliated stations, were deemed necessary to restrain the exercise of network market power and to promote competition and diversity.

Clearly, we live in a very different world today. Network "dominance" is a thing of the past. Revolutionary changes in technology and competition have fundamentally altered the competitive position of broadcast stations and networks, and have introduced numerous new competitors to the marketplace.

Today, there are more broadcast television *networks* than there were commercial television *stations* when some of the rules were adopted. In addition to a larger number of networks, stations have many non-network sources of programming. Most households today are located in markets served by 11 or more television stations. Between cable and satellite, almost every household in the U.S. has the option of purchasing multi-channel video programming service, typically offering dozens or even hundreds of channels. Approximately 78 percent of television households subscribe to some form of multi-channel video programming service. Cable's combined subscription and advertising revenues exceed those of the broadcast networks. VCRs and video games are ubiquitous. And the rise of the Internet is one of the biggest economic and social developments of the past 50 years.

As a result of these dramatic changes, viewers, advertisers, program suppliers, networks, and stations have a large and growing variety of options available to them that were not available in the past. The existence of these options has several fundamental implications for the regulation of television broadcasting:

First, because broadcasters face much greater competition than ever before, there is no longer a need for a comprehensive set of regulations to protect viewers and advertisers from the exercise of network or station market power. Market forces, coupled with antitrust enforcement, will generally be sufficient to protect the public interest.

Second, because broadcasters have alternative channels for investment and growth, station and network owners have incentives to direct their creative and investment efforts elsewhere if their ability to engage in non-subscription, over-the-air broadcasting is artificially constrained by regulation. By reducing the economic opportunities and returns in broadcasting, regulation distorts investment decisions and drives broadcasters to direct more of their resources away from over-the-air broadcasting and toward cable and other distribution outlets.

Third, because local stations have an increased number of alternatives to affiliating with any given network, there is no need for a comprehensive set of regulations to protect stations from the exercise of network market power.

The national multiple ownership rule, under which a single entity cannot control television stations whose combined coverage exceeds 35 percent of U.S. television households, serves as an instructive example of the significance of these changes for the formulation of appropriate public policy. While the rule was originally adopted to promote the goals of competition and diversity, today it has no public interest justification. This conclusion follows from two central findings established in the paper.

One, *there is no evidence that the national station ownership cap serves any policy goal*. The available data and economic analyses support the conclusion that:

- Elimination of the cap would not threaten competition and indeed can be expected to strengthen broadcasters as competitors;
- Elimination of the cap would not affect diversity;
- The cap does not promote minority ownership; and
- Owners whose station groups have broad national audience reaches are equally if not more committed to localism than are owners of single stations or owners whose station groups reach smaller percentages of U.S. households.

Two, *while the rule has no public interest benefits, the rule raises costs, leads to a less efficient organization of the industry, and therefore reduces program quality and raises the cost of advertising*. More specifically, the rule:

- Limits the realization of economies of scale and scope associated with common ownership of multiple stations, thus raising costs and reducing the incentives to invest in over-the-air television;

- Blocks the expansion of particularly well-run station groups, thus artificially raising costs and denying viewers and advertisers the benefits that would come from station management by owners who are especially able to serve viewer and advertiser interests; and

- Limits the ability of the broadcast networks to own stations, an arrangement which would otherwise improve the coordination between the networks and the stations that carry their programming. Restrictions on station ownership thus limit the returns and increase the risks of network investments in high-quality and innovative programming. Consequently, the national ownership cap reduces the networks' incentives to make such investments and ultimately diminishes the quality and diversity of programming.

In short, *this rule now harms the public interest rather than protects it.*

The Commission itself has repeatedly recognized over the past 15 years that limitations on national station ownership are arbitrary and unnecessary. In fact, in 1984 the Commission decided to sunset the rule completely by 1990, but Congressional opposition forced the Commission to abandon the planned sunset. Subsequently, the Commission has acknowledged that elimination of the rule would threaten neither competition nor diversity and would lead to efficiencies that would benefit the public. Yet, although careful and repeated analysis demonstrates a clear public interest in eliminating the multiple ownership cap immediately, the Commission continues to keep the rule in place.

The retention of the cap is particularly troubling (and puzzling) in the light of the Commission's recent decision to relax local ownership limits. This action only confirms that national ownership restrictions are arbitrary and unjustified. How can the Commission rationally conclude that a group owner at the current 35 percent national audience cap can purchase a *second* station in New York City without threatening competition or diversity, but cannot purchase a station in San Francisco, where it does not currently own one? How would ownership of the San Francisco station adversely affect either the diversity of programming available to New York viewers or the options available to advertisers seeking to reach New York consumers? Relaxation of the local ownership rule was clearly the correct decision, but it only serves to underscore the lack of any public interest basis for the national ownership cap.

This is not the first time that there has been concern that an inefficient regulatory regime for broadcast television is harming the public interest. Yet, over-the-air broadcasting has survived. So why is there any need to act now? The answer is twofold. First, over-the-air broadcast television faces greater competition than ever, and the effects of that competition on the nature of programming are being felt by broadcasters and viewers today. Networks are being outbid by cable networks for first-run broadcast rights to movies. And cable competition so eroded the audience for their weekday morning children's programming that the Fox network abandoned that daypart for children's television. Policy makers should be concerned when these and similar developments are the result of outmoded and unnecessary regulation rather than marketplace forces.

The second reason there is a public interest in acting now is that current policies are creating long-term costs by distorting investment incentives. Network owners have greater opportunities to redirect their investment efforts (both financial and creative) than ever before. And they are taking advantage of these opportunities. For example, ABC is launching a new soap opera channel. But instead of taking advantage of newly allocated digital broadcast spectrum to distribute the channel as a non-subscription over-the-air service, ABC is putting this new channel on cable. Similarly, when Fox decided to go into the national news business, it launched a cable network, FOX News Channel, rather than develop a national news programming service for its broadcast network.

By distorting economic returns in broadcasting, regulations inefficiently drive the networks to direct more of their financial and creative resources toward cable properties and other distribution platforms. That the networks are branching into other services is *not* the problem—it is privately and socially valuable for them to make use of their skills and assets in these other services. Rather, the problem arises when regulation *distorts* these investment decisions. It is also important to recognize that, once broadcasters start investing in a particular direction, it may be hard to reverse the effects of regulatory distortions. Consequently, the time to reform broadcast television regulation is now.

TABLE OF CONTENTS